UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/027,265	12/21/2001	Rosann Marie Matthews Kaylor	16,976	3108

23556 7590 12/16/2009

KIMBERLY-CLARK WORLDWIDE, INC.
Tara Pohlkotte
401 NORTH LAKE STREET
NEENAH, WI 54956

EXAMINER	
FOREMAN, JONATHAN M	
ART UNIT	PAPER NUMBER
3736	

MAIL DATE	DELIVERY MODE
12/16/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROSANN MARIE MATTHEWS KAYLOR,
DENNIS STEIN EVERHART, JEFFREY DEAN LINDSAY
and JASON PATRICK McDEVITT

Appeal 2009-004376
Application 10/027,265
Technology Center 3700

Decided: December 16, 2009

Before ALLEN R. MACDONALD, *Vice Chief Administrative Patent Judge*, JENNIFER D. BAHR and STEVEN D.A. McCARTHY, *Administrative Patent Judges*.

McCARTHY, *Administrative Patent Judge*.

DECISION ON APPEAL

The Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision finally rejecting:

claims 41, 43 and 75 under 35 U.S.C. § 102(b) as being anticipated by Smith (US 4,327,744, issued May 4, 1982);

claims 41, 43-45 and 75 under § 102(b) as being anticipated by Roth (US 4,920,974, issued May 1, 1990);

claims 41, 43, 51, 53, 56, 57, 75, 77 and 79 under § 102(b) as being anticipated by Anapliotis (US 6,123,676, issued Sep. 26, 2000);

claim 78 under § 102(b) as being anticipated by Bora (US 4,335,731, issued Jun. 22, 1982);

claim 79 under § 102(b) as being anticipated by Ubersax (US 3,672,351, issued June 27, 1972);

claims 41, 43, 46, 48 and 76 under 35 U.S.C. § 103(a) as being unpatentable over Kreiser (US 2004/0092843 A1, publ. May 13, 2004) and Dreibelbis (US 5,728,340, issued Mar. 17, 1998);

claims 44, 45, 54 and 55 under § 103(a) as being unpatentable over Anapliotis and Forte (US 6,114,024, issued Sep. 5, 2000);

claims 49 and 50 under § 103(a) as being unpatentable over Kreiser, Dreibelbis and Forte; and

claim 58 under § 103(a) as being unpatentable over Anapliotis and Lawrence (US 5,660,790, issued Aug. 26, 1997).

The Examiner has withdrawn claims 1-40, 42, 47, 52 and 59-74 from consideration.

We REVERSE.

Claim 41 is typical of the claims on appeal:

> 41. A method for collecting a sample from a test subject, the method comprising:
>
> providing a device adapted to capture and retain the sample, wherein the device includes a generally tubular nonwoven body including a generally tubular inner surface defined by an interior layer, the inner surface defining a pocket therewithin, the pocket having a distal end and a proximal end, the distal end being generally closed and the proximal end being generally open, the proximal end being configured to allow the insertion of a finger into the pocket through the proximal end, and a generally tubular outer surface;
>
> inserting a finger into the pocket; and
>
> contacting the sample with the device.

Independent claim 41 recites a method for collecting a sample from a test subject including a first step of providing a device adapted to capture and retain a sample. Independent claims 46 and 51 recite methods for analyzing a sample, each method including a first step of providing a device adapted to capture and retain a sample. The device provided in the first step of each method "includes a generally tubular nonwoven body."

The Appellants formally define the term "nonwoven web" in the Specification as referring to "a web having a structure of individual fibers or threads that are interlaid, but not in an identifiable manner as in a knitted fabric." (Spec. 6, ll. 16-18). Since the noun "web" appears in the formal definition, the intent of this definition appears to be to limit the scope of the adjective "nonwoven."

As the Examiner points out, however, claims 41, 46 and 51 recite that the device provided in the first step of each method includes a generally tubular "nonwoven body" rather than a generally tubular nonwoven web. (*See* Ans. 10-11). While the term recited in claims 41, 46 and 51 is not identical to the term formally defined in the Specification, the formal definition in the context of the present Specification and claims shows an intent on the part of the Appellants to disclaim any interpretation of the term "generally tubular nonwoven body" broad enough to encompass generally tubular bodies other than bodies having structures of individual fibers or threads that are interlaid, but not in an identifiable manner as in a knitted fabric. To interpret the term "nonwoven body" more broadly would result in inconsistent interpretations of the adjective "nonwoven" as used in the claims and the Specification depending on which noun the adjective modifies.

With respect to the rejection of independent claim 41 and its dependent claims 43 and 75 as being anticipated by Smith; the rejection of claim 41 and its dependent claims 43-45 and 75 as being anticipated by Roth; the rejection of independent claim 41 and its dependent claims 43 and 75 as being anticipated by Anapliotis; and the rejection of independent claim 51 and its dependent claims 53, 56, 57 and 77 as being anticipated by Anapliotis,[1] the Appellants contend that neither Smith nor Roth nor Anapliotis discloses providing a device including a generally tubular nonwoven body. (Br. 4-6).

---

[1] The rejection of claim 79 under § 102(b) as being anticipated by Anapliotis will be addressed separately.

Smith discloses a device for self-collection of cervical cell specimens. (Smith, col. 2, ll. 40-43). Smith describes the device as including a tubular finger member *12* "formed of a thin elastically resilient material such as an elastic silicone latex of the type commonly used to form surgical gloves." (Smith, col. 2, ll. 53-56; *see also id.*, col. 1, ll. 50-57). The Examiner finds that Smith's tubular finger member *12* is a generally tubular nonwoven body. (*See* Ans. 4).

Roth discloses a device for obtaining cervical cell culture specimens. (Roth, col. 2, ll. 8-12). The device includes an elastically flexible sheath. (Roth, col. 3, ll. 4-7). Roth discloses that the sheath is "typically fabricated from an inexpensive, water-impermeable rubbery material such as natural rubber (latex) or a synthetic material such as polyurethane or the like." (Roth, col. 3, ll. 13-16). The Examiner finds that Roth's device is a generally tubular nonwoven body. (*See* Ans. 4 and 11-12).

Anapliotis discloses a slip-on, elastic protective clothing article taking the form of a finger stall *14* for use during a medical examination. (Anapliotis, col. 1, ll. 51-54 and col. 4, ll. 21-23). A diagnostic strip 18 secured to the finger stall 10 by double-sided adhesive strip measures the pH of endogenous fluids during the examination. (Anapliotis, col. 4, ll. 43-49 and 60-62). Anapliotis describes the protective clothing article *10* as "preferably made of polyethylene, since a particularly good adhesion is attainable with this material in a simple manner between the diagnostic strip and protective clothing article by means of a two-sided adhesive strip . . . ." (Anapliotis, col. 4, ll. 33-37). The Examiner finds that Anapliotis' protective clothing article *10* is a generally tubular nonwoven body. (*See* Ans. 5 and 12).

Smith's description of Smith's device *12*; Roth's description of the sheath *12*; and Anapliotis' description of the protective clothing article *10* are each consistent with tubular members formed of continuous polymeric sheet or film materials rather than from interlaid fibers. Since the passages of Smith, Roth and Anapliotis on which the Examiner relies do not expressly or inherently describe generally tubular nonwoven bodies, and since the Examiner identifies no other passage of Smith, Roth or Anapliotis which might describe providing such a body, the Appellants have shown that the Examiner erred in rejecting claims 41, 43 and 75 under § 102(b) as being anticipated by Smith; in rejecting claims 41, 43-45 and 75 under § 102(b) as being anticipated by Roth; and in rejecting claims 41, 43, 51, 53, 56, 57, 75 and 77 under § 102(b) as being anticipated by Anapliotis.

With respect to the rejections of independent claim 41 and its dependent claim 43, and of claim 46 and its dependent claims 48 and 76, as being unpatentable over Kreiser and Dreibelbis, the Appellants contend that Kreiser and Dreibelbis, alone or in combination, would not have provided one of ordinary skill in the art reason to provide a device including a generally tubular nonwoven body. (Br. 7). With respect to the rejection of claims 49 and 50, which each depend from independent claim 46, the Appellants contend that Kreiser, Dreibelbis and Forte, alone or in combination, would not have provided one of ordinary skill in the art reason to provide a device including a generally tubular nonwoven body. (Br. 8).

Kreiser discloses a hand-mounted device *100* for obtaining a sample of blood from the scalp of a fetus and for measuring the pH of the blood sample. The pH measuring device includes a lancet *106* slidably received in a lancet guide tube *108* for accessing the sample of blood and a capillary *116*

slidably received in a capillary guide tube *118* for collecting the sample. Kreiser discloses mounting the lancet guide tube *108* and the capillary guide tube *118* on a finger cot or surgical glove. (Kreiser 1-2, para. 0016-17).

Dreibelbis discloses fabricating a tear-resistant surgical glove by dipping a mandrel into a degassed solution of polyester-urethane-urea prepolymer. (Dreibelbis, col. 2, ll. 19-54; *see also id.*, Abstract). The Examiner concludes that it would have been obvious "to form the tubular body as disclosed in Kreiser et al. from a nonwoven elastic material as taught by Dreibelbis et al. in order to make the tubular body more resistant to punctures and tearing (See Abstract)." (Ans. 8).

Forte discloses a breathable (that is, moisture vapor transporting) polymer film material providing an effective barrier against microorganisms and bodily fluids. (Forte, col. 5, ll. 4-9; *see also id.*, col. 1, ll. 28-33). Forte describes fabricating the film material by simultaneously extruding and then stretching a five-layer polymer film including a microporous core layer; two outer monolithic layers containing hydrophilic polymer resin; and microporous adhesive layers for bonding the outer layers to the opposite sides of the core layer. (*See* Forte, col. 3, l. 48 – col. 4, l. 10). Forte teaches the use of the film material in gloves. (Forte, col. 1, ll. 34-37). The Examiner concludes that it would have been obvious "to modify the device as disclosed by Kreiser et al. in view of Dreibelbis et al. to include a material that is substantially impermeable to liquids yet breathable to water vapor as taught by Forte in order to allow the body of the user to cool naturally." (Ans. 9).

Kreiser does not appear to disclose the material from which Kreiser's finger cot is made. Dreibelbis' method for fabricating a glove is consistent

with the fabrication of a glove consisting of a continuous polymeric film or sheet material rather than a material formed from interlaid fibers. The reasoning articulated by the Examiner in support of the rejections of claims 41, 43, 46, 48 and 76 as being unpatentable over Kreiser and Dreibelbis fails to explain why one of ordinary skill in the art would have wished to fabricate Kreiser's finger cot as a nonwoven body and consequently fails to adequately support the legal conclusion of obviousness. The Appellants have shown that the Examiner erred in rejecting claims 41, 43, 46, 48 and 76 under § 103(a) as being unpatentable over Kreiser and Dreibelbis.

With respect to the rejection of claims 49 and 50, Forte's extruded and stretched multilayer polymeric material is not a nonwoven material. The Examiner fails to articulate reasoning sufficient to explain how Forte might make up the deficiencies of the combined teachings of Kreiser and Dreibelbis. The Appellants have shown that the Examiner erred in rejecting claims 49 and 50 under § 103(a) as being unpatentable over Kreiser, Dreibelbis and Forte.

With respect to the rejections of dependent claims 44 and 45, each of which depends from independent claim 41, and of claims 54 and 55, each of which depends from independent claim 51, the Appellants contend that Anapliotis and Forte, alone or in combination, would not have provided one of ordinary skill in the art reason to provide a device including a generally tubular nonwoven body. (Br. 7-8). With respect to the rejection of claim 58, which depends from independent claim 51, the Appellants contend that Anapliotis and Lawrence, alone or in combination, would not have provided one of ordinary skill in the art reason to provide a device including a generally tubular nonwoven body. (Br. 8).

Lawrence discloses a pH test device including a pH indicator lamina formed over the surface of a substrate lamina. (Lawrence, col. 7, ll. 49-51). Lawrence's pH indicator lamina changes color when exposed to a bodily fluid to indicate the pH of the fluid. (Lawrence, col. 7, l. 57 – col. 8, l. 18). Lawrence teaches reading the color change either visually or by use of a machine. (Lawrence, col. 12, ll. 14-19). The pH indicator layer of Lawrence's pH test device consists of a pH indicator immobilized in a solid polymer matrix. (Lawrence, col. 3, ll. 36-39).

As noted earlier, Anapliotis' description of Anapliotis' protective clothing article *10* is consistent with tubular members formed of continuous polymeric sheet or film materials rather than from interlaid fibers. The Examiner has not articulated reasoning explaining how Forte or Lawrence overcomes this deficiency in the teachings of Anapliotis. With respect to the rejection of claims 44, 45, 54 and 55, the Examiner reasons that it would have been obvious "to modify the device as disclosed by Anapliotis to include a material that is substantially impermeable to liquids yet breathable to water vapor as taught by Forte in order to allow the body of the user to cool naturally." (Ans. 8). With respect to the rejection of claim 58, the Examiner reasons that it would have been obvious "to modify the method as disclosed by Anapliotis to include the step of observing the reaction using a reader as taught by Lawrence et al. in order to more precisely quantify the reaction" of a pH indicator exposed to a bodily fluid. (Ans. 9). Neither reason explains why one of ordinary skill in the art would have wished to fabricate Anapliotis clothing article as a nonwoven body. The Appellants have shown that the Examiner erred in rejecting claims 44, 45, 54 and 55 under § 103(a) as being unpatentable over Anapliotis and Forte. The

Appellants also have shown that the Examiner erred in rejecting claim 58 under § 103(a) as being unpatentable over Anapliotis and Lawrence.

Claim 78 recites a method for collecting a sample from a test subject. The method includes providing a finger glove device adapted to capture and retain the sample. The finger glove device includes a generally tubular body comprising a first panel thermally bonded to a second panel. The first panel comprises "a non-elastic material containing a nonwoven web." The second panel comprises "an elastic nonwoven material." The Appellants' formal definition of the term "nonwoven web" in the Specification shows an intent on the part of the Appellants to disclaim any interpretation of the term "nonwoven material" broad enough to encompass materials other than those having structures of individual fibers or threads that are interlaid, but not in an identifiable manner as in a knitted fabric.

With respect to the rejection of claim 78 as being anticipated by Bora, the Appellants contend that Bora fails to disclose a generally tubular body including a first panel comprising a material containing a nonwoven web and a second panel comprising a nowoven material. (Br. 6-7). Bora discloses a dental wipe for cleaning teeth. The dental wipe takes the form of a finger cot *32* including a "U" shaped sheet *34* and a sheet *36*. The "U" shaped sheet *34* and the sheet *36* are secured together at their edges by heat sealing with a sheet *38* between them. The three sheets together form a finger stall. (Bora, col. 3, ll. 20-25). Bora discloses that the sheets *34* and *36* are "flexible reticulated polyurethane foam or flexible non-reticulated polyurethane foam or a combination of both. Sheet *38* is substantially firmer than sheets *36* and *38* [*sic*, sheets *34* and *36*] and of, for example, a firm polymeric material." (Bora, col. 3, ll. 25-30). The Examiner finds that

Bora's sheet *38* is a first panel and that Bora's "U" shaped sheet *38* is a second panel. (*See* Ans. 6 and 13).

Bora's description of the sheet *38* is consistent with a sheet or panel formed of a polymeric sheet or film material rather than a nonwoven material. Bora describes the "U" shaped sheet *34* as made from a flexible reticulated polyurethane foam rather than a nonwoven material. The Examiner articulates no technical reasoning sufficient to provide a sound basis for belief that the structure or properties of Bora's flexible reticulated polyurethane foam are identical to the structure or properties of any nonwoven material. Since the passage of Bora on which the Examiner relies does not expressly or inherently describe the two panels recited in claim 78 and since the Examiner identifies no other passage of Bora which might describe such panels, the Appellants have shown that the Examiner erred in rejecting claim 78 under § 102(b) as being anticipated by Bora.

Claim 79 recites a method for analyzing a sample. The method includes providing a device adapted to capture and retain the sample. The device includes a generally tubular body comprising a first panel attached to a second panel. The second panel comprises "an elastic nonwoven material," that is, a material having structures of individual fibers or threads that are interlaid, but not in an identifiable manner as in a knitted fabric.

With respect to the rejection of claim 79 as being anticipated by Anapliotis, the Appellants contend that Anapliotis does not disclose a generally tubular elastic nonwoven. (Br. 5-6). With respect to the rejection of claim 79 as being anticipated by Ubersax, the Appellants contend that Ubersax fails to disclose a generally tubular body including a second panel comprising a nonwoven material as recited in claim 79. (Br. 6). Ubersax

discloses a device including "a glove of an impermeable material, such as rubber or other elastic or plastic material." (Ubersax, col. 1, ll. 29-33). A test patch impregnated with an indicator composition is affixed to the distal end of the thumb portion of the glove *1*. (*Id.*; Ubersax, col. 1, ll. 34-36). The Examiner finds that Ubersax's glove *1* is the second panel recited in claim 79. (*See* Ans. 6 and 13).

Anapliotis' description of Anapliotis' protective clothing article *10* and Ubersax's description of the glove *1* are each consistent with a structure formed from a polymeric sheet or film material rather than a nonwoven material. Since the passages of Anapliotis and Ubersax on which the Examiner relies do not expressly or inherently describe the second panel recited in claim 79 and since the Examiner identifies no other passage of Anapliotis or Ubersax which might describe such a panel, the Appellants have shown that the Examiner erred in rejecting claim 79 under § 102(b) as being anticipated by either one of Anapliotis and Ubersax.

DECISION

We REVERSE the Examiner's decision rejecting claims 41, 43-46, 48-51, 53-58 and 75-79.

REVERSED

Klh

KIMBERLY-CLARK WORLDWIDE, INC.
TARA POHLKOTTE
401 NORTH LAKE STREET
NEENAH WI 54956